Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-405

NOGALES SERVICE CENTER,
an Arizona corporation,

Petitioner,

v.

ATLANTIC RICHFIELD COMPANY,
a Pennsylvania corporation,

Respondent.

PETITIONER'S REPLY BRIEF ON CERTIORARI

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ARGUMENT

The respondent ARCO would have this court believe that State Courts are precluded from concurrent jurisdiction over antitrust suits because "had Congress meant to provide for [such concurrent jurisdiction] it knew how to do so". Brief in Opposition, p. 5. Of course, it has stated the inverse of the rule for determining concurrent jurisdiction. In fact, concurrent jurisdiction is the "common phenomenon in our judicial history" and exclusive jurisdiction is only declared, where Congress has excluded jurisdiction of State Courts "by express provision". *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 508 (1962).

The respondent company would have this court believe

that legislative history such as remarks in debate by sponsors, floor managers, and drafters of a bill are inappropriate indications of the meaning of an ambiguous statute. This contention rests upon an incomplete quotation, the whole of which stands for something quite different than ARCO contends. The portion omitted by ARCO is shown in brackets:

> "These statements of the author of the Act in advocating its adoption cannot, of course, control its construction, where there is doubt as to its meaning. [; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, *and thus served to indicate the probable intention of Congress in the passage of the Act*]". *Jennison v. Kirk*, 98 U.S. 453, 459, 460 (1878) (emphasis added).

Legislative history is unnecessary where the meaning of a statute is unambiguous. In this case, Congress has said that a private claimant "may sue [for a violation of the Sherman Act] in any District Court of the United States . . ." 15 U.S.C. §15. Just as this court held in *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), 29 U.S.C. §185 that concurrent jurisdiction was intended by Congress saying that suit "may be brought in any District Court", so, too, this statute unambiguously intends the same result.[1]

[1] *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) is uniquely instructive of the proper disposition of this case. There, the "may sue" statutory language was used. This Court, Mr. Justice Stewart, first described the pertinent principles of concurrent and exclusive jurisdiction. The opinion then canvasses legislative history very similar to that existing for the Sherman and Clayton Acts, on the question of concurrent jurisdiction. The statute's language was all but identical with that at issue here. The Court recognized that the substantive law involved was to be the unique Federal Labor Law. But the language of the statute and the history as derived from floor managers' debates mandated a finding of concurrent jurisdiction. It is just this analysis that has never been undertaken as to the Sherman Act, which we now ask the Court to undertake.

But if any doubt there be, the legislative history makes plain the intended concurrent jurisdiction. Such legislative history has, of course, been appropriate source of the meaning of the statute. *E.g., Federal Energy Administrator v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976); *United States v. City and County of San Francisco*, 310 U.S. 16 (1940); *Kansas City, Missouri v. Federal Pacific Electric Co.*, 310 F.2d 271 (8th Cir. 1962). ARCO's argument to the contrary, on the basis of one misleading citation, is frivolous. Indeed, ARCO has never disagreed, through proceedings in the trial court and at three appellate levels, that Congress intended for the courts of the States and the United States to have concurrent jurisdiction.[2]

Instead it has argued that this meaning should be ignored and the dictum of *Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943) and *Blumenstock Brothers Advertising Agency v. Curtis Publishing Company*, 252 U.S. 436 (1970) should be blindly followed.

ARCO would have this court believe that the eight cases cited on page 3 of its brief contradict the statutory meaning urged by the petitioner. In fact, in seven of the eight cases the *Blumenstock* or *Freeman v. Bee* dicta were accepted incidentally to deciding other issues, and were not directly litigated. In an eighth, the refusal of state court jurisdiction was mentioned without any supporting citation or analysis.

Of the four denials of certiorari reported by ARCO on page 3, none presented to this court the issue framed by this

[2] Its contention, Brief, p. 5, that legislative history has been "selectively excerpted" is puzzling. It knows that extensive additional legislative history was presented in the courts below, from which excerpts were included in the petition to serve merely as an example. It has never disagreed with the legislative history presented, and its import.

case.[3]

This Court's reference to exclusive federal jurisdiction for Sherman Act claims, in *Vendco Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977) was again premised, both in the plurality opinion of Mr. Justice Rehnquist and the dissent of Mr. Justice Stevens, upon the *Freeman v. Bee Machine Co., supra,* dicta. *Vendco* demonstrates the benefit of reconsidering the exclusive jurisdiction dicta. Had the Illinois Court been able to consider federal antitrust violations by way of affirmative defense or counterclaim, this court would never have had to decide whether an injunction could issue by the District Court, to restrain collection of the Illinois judgment. Instead, the antitrust claims would not have been abandoned in the state court suit, and a second round of litigation in the District Court would have been avoided, as would the need for this court to address the delicate and highly technical Anti-Injunction Act issues, without sacrificing the concerns of the *Vendco* dissenters that the antitrust act be made fully effective.

This court said, in *General Investment Co. v. Lakeshore and M.S.R. Co.*, 260 U.S. 261 (1922) that 15 U.S.C. §26, respecting jurisdiction in private antitrust actions for

[3]In *North Carolina v. Charles Pfeiser and Co., Inc.* No. 75-1801, *cert. denied,* 429 U.S. 870 and *Overseas Motors Inc. v. Import Motors Ltd., Inc.*, No. 75-494, *cert. denied,* 423 U.S. 987, the issue of concurrent jurisdiction was not raised in any way. In *Westinghouse Electric and Manufacturing Co. v. McGregor,* No. 373 O.T. 1944, certiorari was denied for lack of a final judgment. 323 U.S. 761. In *Gold Fuel Service Inc. v. Essons Standard Oil Co.*, No. 361 O.T. 1960, *cert. denied,* 364 U.S. 882, the issue was seemingly raised by the questions presented in the petition, but actually was argued as an attempt to modify State Common law by incorporating Sherman Act principles; a posture that would deprive this court of jurisdiction to review the State Court opinion.

injunctive relief, reposed exclusive jurisdiction in the Federal Courts for such actions. Like *Freeman v. Bee Machine Co., supra,* and *Blumenstock, supra,* the opinion of Justice Van deVanter was devoid of any analysis whatsoever, either of the language of the statute, of the legislative history, or of the rules of construction for deciding exclusive or concurrent jurisdiction. To be sure, many courts and commentators have acknowledged the statements in *Blumenstock, Freeman,* and *General Investment Co.,* without critical analysis. Not once, however, has this court or any court held, after canvassing the legislative history, parsing the specific words used in the statute, and applying the precedents on concurrent jurisdiction, that a litigant like Service Center could not seek damages in the state courts for violation of the Sherman Act. Yet to so hold would eliminate the forum shopping that has occurred in this case, the duplication of litigation that is demonstrated in this case and in *Vendco, supra,* and the exclusion of State antitrust claims from state courts that has, in fact, occurred because of the exclusive jurisdictional rule. If Sherman Act claims may be joined with State antitrust claims in the courts of the states, the judgments resulting may, as often as not, ultimately be grounded upon the State law claims; a result quite desirable but all but impossible under the exclusive jurisdiction that is now assumed.

This Court should grant certiorari and consider whether the statute intended concurrent jurisdiction, and whether both antitrust enforcement and judicial economy will be served by concurrent jurisdiction.

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